80-1151

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

TERM, 1980

TERRANCE P. HAHN and BARBARA HAHN,

Petitioners,

vs.

ATLANTIC RICHFIELD CO., a Pennsylvania corporation and JOHN DOE #1, EATON CORPORATION, Manufacturer and/or Supplier of the crane, and/or safety hook and/or rigging and JOHN DOE #2, Crane Rental Company and FLUOR ENGINEERS & CONSTRUCTORS, Third and Price Streets, Marcus Hook, Pennsylvania,

Respondents.

ON PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it reversible error to retroactively apply a court decision changing the statute of limitations without giving consideration to the decisions of this Court regarding retroactivity?

2. Where plaintiff, in an action for breach of express and implied warranties under the Uniform Commercial Code, is an employee of the supplier of a defective "One Ton Chain Hoist" and as such, has no access to business records of his employer; and co-defendants are plaintiff's employer and the manufacturer of the defective hoist; should the burden of producing evidence relative to the existence of a sale of the hoist from one co-defendant to the other be shifted to the defendants who have peculiar means of knowledge concerning possession of the hoist?

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1980

No.

TERRANCE HAHN and BARBARA HAHN,

Petitioners,

vs.

ATLANTIC RICHFIELD, *et al.*,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Petitioners, Terrance Hahn and Barbara Hahn, respectfully pray that a writ for certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 3, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, No. 79-2156, (3d Cir., July 3, 1980) is reported at 625 F.2d 1095. The opinion is set forth in the Appendix hereto at 1a.

The judgment of the Court of Appeals reversed the final decision of the United States District Court for the

Eastern District of Pennsylvania. The District Court's memorandum opinion and order are unpublished. They are set forth in Appendix B. The date of the District Court's order is June 20, 1979.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 3, 1980. A petition for rehearing was filed by petitioners Terrance and Barbara Hahn on July 17, 1980. The petition for rehearing was denied on September 25, 1980. This petition for certiorari has been filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are pertinent to this case:

1. Warranty provisions of the Uniform Commercial Code as enacted in Pennsylvania, which provide, inter alia:

§2–313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express

warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

1953, April 6, P.L. 3, §2–313, eff. July 1, 1954. Reenacted 1959, Oct. 2, P.L. 1023, §2, eff. Jan. 1, 1960.

§2–314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE

(1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.

1953, April 6, P.L. 3, §2–314, eff. July 1, 1954. Reenacted 1959, Oct. 2, P.L. 1023, §2, eff. Jan. 1, 1960.

§2–315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

1953, April 6, P.L. 3, §2–315, eff. July 1, 1954. Reenacted 1959, Oct. 2, P.L. 1023, §2, eff. Jan. 1, 1960.

2. Statute of Limitations imposed under the Uniform Commercial Code as enacted in Pennsylvania, which provides:

§2–725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE

(1) An action for breach of any contract for sale must be commenced within four years after the cause

of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicity extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

1953, April 6, P.L. 3 §2–725, eff. July 1, 1954. Reenacted 1959, Oct. 2, P.L. 1023 §2, eff. Jan. 1, 1960.

3. Statute of Limitations provisions contained in the recently enacted Judicial Code of Pennsylvania, Act of 1976, July 9, P.L. 586 No. 142 as amended by Act of 1978-53, April 28, P.L. 202, 42 Pa. C.S.A. §5524(2) and §5525(a), which provide, inter alia.

"An action to recover damages for injuries to the person or for the death of an individual caused by the wrong-

ful act or neglect or unlawful violence or negligence of another [must be commenced within two (2) years]". 42 Pa. C.S.A. 5524(2).

"*Any action* subject to 2–725 (relating to statutes of limitations in contracts for sale) of the Act of April 6, 1953 (P.L. 3, No. 1) known as the 'Uniform Commercial Code' [must be commenced within four (4) years]. (Emphasis supplied). 42 Pa. C.S.A. 5525(2)".

4. 28 U.S.C. §1332 (See Appendix D).

5. 28 U.S.C. §1254(1) (See Appendix D).

STATEMENT OF THE CASE

This petition arises from a personal injury action brought by Terrance and Barbara Hahn, petitioners, to recover for injuries sustained by Terrance P. Hahn when a six hundred pound pipe suspended overhead by a Yale one ton chain hoist fell on him as a result of defects in the one ton chain hoist.

On December 14, 1972 petitioner, Terrance Hahn was employed by respondent Fluor Engineers and Constructors. During the course of his employment, he was struck by a pipe which had been suspended by the Yale one ton hoist. The force of the blow knocked him from an elevated platform upon which he was working to the ground approximately twenty feet below. As a result he sustained severe brain damage which has disabled him for life. The accident took place on property owned by Atlantic Richfield Corporation, which had employed respondent Fluor Engineers to perform services thereon.

Shortly after the accident the one ton chain hoist disappeared, and despite extensive efforts by all counsel in-

volved herein, it was never recovered. Consequently no serial numbers or other identifying information were available. Thus, counsel for petitioners was severely handicapped in the investigation and identification of the manufacturer of the one ton chain hoist.

On November 12, 1974, petitioners, although still unable to identify the manufacturer of the hoist, filed a Complaint in U.S. District Court for the Eastern District of Pennsylvania against Atlantic Richfield Corporation, Fluor Engineers and Constructors, John Doe #1, Manufacturer and/or supplier of the crane and/or safety hook and/or rigging and John Doe #2, Crane Rental Company.

Jurisdiction in the district court was based upon 28 U.S.C. §1332 which confers original jurisdiction upon the district courts over all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs and is between citizens of different States.

On June 30, 1976, upon consideration of petitioners' Motion to Amend their Complaint, an Order was entered substituting Eaton Corporation for John Doe #1.

After further investigation petitioners filed another Motion to Amend their Complaint on March 1, 1977, alleging that respondent, Eaton Corporation breached express and implied warranties with regard to the hoist in question. This motion was also granted, and on March 17, 1977, an Order was entered allowing petitioners to so amend, which amendment dated back to June 30, 1976 pursuant to Federal Rule of Civil Procedure 15(c).

The case proceeded to trial with a jury on May 25, 1978. On the same date John Doe #2 was dropped as a defendant and a directed verdict was entered in favor of

Atlantic Richfield Corporation, from which no appeal was taken. Thus, at trial the only defendants were Fluor Engineers and Constructors and Eaton Corporation.

To maintain a warranty action under the Uniform Commercial Code, it is necessary to establish a sale. Petitioners presented all available evidence to establish a sale of the hoist from Eaton to Fluor. However, because of the disappearance of the hoist and petitioner's position as merely an employee of Fluor, petitioners had to rely upon answers to interrogatories and admissions of respondents in order to prove a sale. Curiously, although specifically requested by way of interrogatories, neither Eaton nor Fluor provided any business records which would shed any light on this issue.

Despite respondents failure to provide information concerning distribution and ownership of the defective hoist, the evidence showed that Eaton manufactured and sold Yale one ton hoists in 1971 or 1972; that the contract between Fluor and Atlantic Richfield called for a one ton hoist to be used by Fluor in performing work at the refinery; that Fluor supplied the hoist involved in the accident; and that the defective hoist was a Yale hoist and was "new" on the date of the accident.

At the close of trial, Eaton moved for a directed verdict, which motion was denied. The case then went to the jury which returned a verdict in favor of petitioners and against Eaton Corporation in the amount of One Million Fifty Thousand ($1,050,000) Dollars based upon a breach of warranty under the Uniform Commercial Code. Moreover, the jury, in answers to interrogatories, specifically found that the hoist malfunctioned, that there was a breach of warranty and that the breach of warranty caused the accident. (See Footnote 6 of the Court of Appeals Opinion at 6a). Eaton subsequently made a motion for judgment

notwithstanding the verdict which was also denied. Eaton had contended that petitioners had not proven a sale.

After the denial of its motion for judgment notwithstanding the verdict, Eaton appealed to the U.S. Circuit Court of Appeals for the Third Circuit. Eaton reiterated its earlier argument that no sale of the hoist from Eaton to Fluor was established. Furthermore, Eaton repeated its original answer to the Complaint, to wit, the action was barred by the applicable statute of limitations.

The Court of Appeals agreed with Eaton on both arguments and in an opinion dated July 3, 1980, reversed the judgment of the district with a direction to enter judgment in favor of Eaton (1a). In reaching its conclusion the Court refused to shift the burden of proof to respondents, absent evidence of a close relationship between them (9a). Furthermore, it retroactively applied a court decision changing the statute of limitations without considering the applicable decisions of this Court (23a).

On July 17, 1980, petitioners filed a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Said petition was denied on September 25, 1980 (See Appendix C).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals ignored the applicable cases of this Court when it retroactively applied a court decision changing the Statute of Limitations to the instant case.

The Court of Appeals, while holding that a two year statute of limitations should apply to non-purchaser warranty actions for personal injuries, noted that such a holding comports with the result reached by the Superior Court of Pennsylvania in *Salvador v. Atlantic Steel Boiler Co.*, 256 Pa. Super. 330, 389 A.2d 1148 (1978) (Salvador II), allocator granted, No. 455 (October 31, 1978). In effect, the Court of Appeals has simply applied Salvador II to the case at bar. However, as will be established below, the Court of Appeals failed to analyze the retroactive application of Salvador II in accordance with the principles of this Court as set forth in *Chevron Oil Company v. Gaines Ted Huson*, 404 U.S. 97 (1971).

In *Chevron*, the plaintiff instituted an action in 1968 for injuries sustained while working on an artificial drilling rig located on the Outer Continental Shelf off the Louisiana Coast. The action was brought under the Outer Continental Shelf Lands Act, which at the commencement of the action held admiralty law applicable. The injury had occurred approximately two years prior to the commencement of the action. While the action was pending trial, this Court decided *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969), which interpreted the Outer Continental Shelf Lands Act as making state law remedies, rather than admiralty law remedies applicable.

The U.S. District Court for the Eastern District of Louisiana, relying on *Rodrigue*, applied Louisiana law to

the case, including its one year statute of limitations on personal injury actions. Thus, plaintiff's action was barred. The Fifth Circuit Court of Appeals reversed and remanded. This Court on certiorari, held that although the state's statute of limitations was applicable, it should not be given retroactive application under *Rodrigue*, since the plaintiff in *Chevron* had instituted his action more than one year before the decision in the *Rodrigue* case, which had resulted in an unforseeable overturning of existing legal doctrine.

In reaching its decision this Court, in an opinion by Justice Stewart, stated,

> "Although we hold that Louisiana's one-year statute of limitations must be applied under the Lands Act as interpreted in Rodrigue, we do not blind ourselves to the fact that this is, in relevant respect, a pre-Rodrigue case. The respondent's injury occurred more than three years before the announcement of our decision in Rodrigue. He instituted the present lawsuit more than one year before Rodrigue. Yet if the Louisiana statute of limitations controls in this case, his action was time barred more than two years before Rodrigue. *In these circumstances, we must consider the respondent's argument that the state statute of limitations should be given nonretroactive application under Rodrigue.* 404 U.S. at 105. [emphasis added]

The instant case presents a chronology which is more compelling than *Chevron* for nonretroactive application of a new statute of limitations. Here, petitioner's injury occurred more than 5½ years before the announcement in Salvador II. The instant action was instituted more than 3½ years before Salvador II. Moreover, it was amended

to include the warranty cause of action more than two years [1] before Salvador II was decided. Yet, if Salvador II is applied retroactively, resulting in a two year statute of limitations being applicable herein, petitioner's action would have been time barred more than four years before Salvador II. Thus, even more than the circumstances in *Chevron*, the circumstances herein warrant consideration by this Court of petitioner's argument that the two year statute of limitations should be given nonretroactive application.

How does one determine whether a decision should be applied retroactively? This Court, in *Chevron, supra,* stated at page 106,

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see *e.g., Hanover Shoe v. United Shoe Machinery Corp., supra,* 392 U.S. at 496 or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen v. State Board of Elections, supra,* 393 U.S. at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* 381 U.S. at 629. Finally we have weighed the

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1. The amendment was made on March 17, 1977. However, by virtue of *Rule* 15(c) F.R.C.P., said amendment related back to the date Eaton was named as an additional defendant, June 30, 1976.

inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra,* 395 U.S. at 706.

The analysis required under the principals stated above is not to be found in the Court of Appeals' opinion. The only mention of retroactivity is made in a footnote where the Court stated:

"The district court believed that as a decision of an intermediate appellate court, *Salvador II* announced a new rule of law in Pennsylvania that should not be applied retroactively because it marked a sharp departure from earlier Pennsylvania supreme court cases, namely *Gardiner* and *Rufo,* on which counsel was entitled to rely.

"We disagree. As we have indicated, we believe that the law in Pennsylvania has been moving away from the *Gardiner-Rufo* approach for quite some time, as evidenced by the supreme court decisions in *Webb v. Zern, Kassab,* and *Salvador I.* In this light, the superior court's opinion in *Salvador II* is not a departure from, but rather further evidence of this development" (23a).

Notwithstanding the Court of Appeals' cursory treatment of the issue of retroactivity, petitioner's contend that the three pronged test as stated in Chevron should have been made by the Court and furthermore, had it been made, the only logical and equitable result would have been that *Salvador II* be applied nonretroactively. As

for the Court of Appeals conclusion that Salvador II did not establish a new principle of law, petitioner contends that Salvador II did, indeed "overrule clear past precedent on which litigants have relied," and decide "an issue of first impression whose resolution was not clearly foreshadowed," *Chevron, supra.* Moreover, the Court of Appeals recognized this in its discussion on the statute of limitations question, where it stated:

> "Determining which Pennsylvania statute of limitations should apply to non-purchaser warranty actions for personal injury is *not an easy task.* The difficulty arises because each of the theories of liability that have developed—strict liability in tort and liability for breach of warranty under the UCC—may be considered to call for the application of a different statute [emphasis added] (17a).

This argument finds further support by noting that Judge Garth of the Court of Appeals was of the opinion that the statute of limitations question should not have been decided because it was merely *dicta.* He stated, "there should have been no attempt to predict the result which the Pennsylvania Supreme Court will reach when it has the statute of limitations question before it in Salvador II" (24a). The only reason a prediction was required by the Court of Appeals is that Salvador II overruled "clear past precedent" and "established new law." *Chevron, supra.*

II. The Court of Appeals, applying Pennsylvania law, ignored clear past precedent by holding that a two year Statute of Limitations period applies.

In 1976, the Pennsylvania Legislature enacted the Judicial Code of Pennsylvania. The pertinent portions of said statute are set out verbatim, *supra*. This statute became effective on June 27, 1978.

Furthermore, in *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964) the Pennsylvania Supreme Court stated at page 420:

> "This appeal presents a question of first impression in the Appellate Court of this Commonwealth. Our examination . . . indicates that it was the legislative intent that there be a four (4) year period of limitation on all actions for breach of contracts for sale, irrespective of whether the damages sought are for personal injury or otherwise."

Clearly, the Pennsylvania Legislature was well aware of the *Gardiner* rule when it enacted the Judicial Code in 1976. Had it wished a two year limitation period to apply to these actions, it would have been an easy task to do so. Thus, by applying a two year statute of limitations to the instant case, the Court of Appeals has acted contrary to well established precedent and has ignored the command of the Pennsylvania Legislature.

III. The decision of the Court of Appeals relative to the burden of proving a sale of a product from a manufacturer to an employer effectively precludes a non-purchaser employee from maintaining an action for breach of warranty for injuries sustained as a result of said breach.

A. *Basis for decision by Court of Appeals*

In the present case the Third Circuit Court of Appeals reviewed the decision of the U.S. District Court for the Eastern District of Pennsylvania denying respondent, Eaton Corporation's motion for judgment notwithstanding the verdict. It is clear that as with a motion for directed verdict, the party against whom a motion for judgment notwithstanding the verdict is made must be given the benefit of every legitimate inference that can be drawn from the evidence. *Denneny v. Siegel,* 407 F.2d 433 (3rd Cir. 1969); Wright and Miller, Fed. Practice & Procedure §2528. Furthermore, an appellate court is bound to interpret the evidence in the light most favorable to the verdict winner. *Kademenos v. Equitable Life Assurance Society,* 513 F.2d 1073 (3rd Cir. 1975).

The Court of Appeals noted these standards and purported to base its decision thereon (7a). In so doing, it concluded that even when viewing the evidence in the light most favorable to petitioner, there is not sufficient evidence that a sale of the hoist from Eaton is Fluor was consummated. The Courts opinion, however, is fatally flawed by the cursory treatment of the burden of producing evidence relative to the critical fact herein, *i.e.,* a sale of the hoist from Eaton to Fluor.

B. *Factual background*

A review of the relevant facts is essential to understand the insurmountable obstacle the Court of Appeals has placed in petitioner's path to recovery.

First, the disappearance of the chain hoist while in the possession of respondents is highly suspect. It was this fact which caused petitioner to rely upon information supplied by respondents under oath to prove a sale. Furthermore, petitioner was unable to assist in the investigation since he was hospitalized with severe injuries. Indeed, petitioner was unable to discover the identity of the manufacturer until after the two year statute of limitations for commencing an action under §402A of the Restatement of Torts had passed.

The second critical factor is the relationship of the parties. Petitioner, Terrance Hahn was an employee of respondent, Fluor Engineers and Constructors. As such, petitioner had no access to the business records of either Fluor or Eaton. As did the disappearance of the chain hoist, this factor required petitioner to prove its case by relying upon answers to interrogatories and admissions of respondents. The verbatim text of these answers and admissions is set out in footnote 5 of the Court of Appeals opinion (4a). The responses of both respondents precluded petitioners from discovering the nature of Fluor's interest in the hoist.

Thus, petitioners were compelled to prove a sale by circumstantial evidence. The Court of Appeals reviewed the evidence as follows:

> "The evidence shows that Eaton manufactured and sold Yale One Ton hoists in 1971 or 1972; that the contract between Fluor and Atlantic Richfield called for a one ton hoist to be used by Fluor in performing

> work at the refinery; that Fluor supplied the hoist involved in the accident; and that the defective hoist was a Yale hoist and was "new" on the date of the accident" (7a).

The Court then reviewed the conceivable possibilities as to how Fluor came to possess the hoist and concluded, "There is simply no evidence either direct or circumstantial, that would indicate how Fluor came to possess the hoist" (8a). In reaching this conclusion the Court of Appeals failed to address the fundamental inequity of this case, to wit, the manufacturer of the defective product may effectively foreclose an injured non-purchasing party from an avenue of redress by merely stating that it has failed to maintain adequate records, thereby reaping an unintended windfall at the expense of the injured non-purchasing party. Petitioners respectfully submit that the evidence outlined above coupled with a negative inference which may be drawn from respondent's failure to provide evidence in its control compel the conclusion that a sale was made by Eaton to Fluor.

C. *Burden of producing evidence*

The conclusion reached by the Court of Appeals flows directly from its erroneous view of the law relative to shifting the burden of producing evidence. Petitioners presented all evidence they were able to obtain concerning a sale of the hoist. It is clear that respondents, as manufacturer and possessor of the hoist, were in a superior position with respect to providing information to prove or disprove a sale. Moreover, the Court of Appeals recognized that "under certain circumstances a court may demand production of evidence from a party not having the ultimate burden of persuasion, and then draw a negative inference from that party's non-production"(9a). How-

ever, the Court refused to do so "absent evidence of a close relationship between Eaton and Fluor. . . ." (9a). Thus, it becomes necessary to examine those circumstances which warrant shifting the burden of producing evidence.

It is well settled that the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false. See 9 J. Wigmore, Evidence §2486 (3rd Ed. 1940). Such is also the law in Pennsylvania. See *e.g.*, *Skeen, et vir, v. Stanley Co. of America*, 362 Pa. 174, 66 A.2d 774 (1949). The Pennsylvania Supreme Court, in *Barrett v. Otis Elevator Company*, 431 Pa. 446, 246 A.2d 668 (1968) stated, "If the existence or non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most easily." 431 Pa. at 452.

Application of these principles to specific situations should ideally produce uniform results regardless of the cause of action. Thus, in *Grimm v. Scoa Industries*, 9 D&C 3d 742 (1979), a Pennsylvania court, while holding that an implied warranty of fitness may be found in a non-sales transaction, stated that "the policy underlying the imposition of products liability applies to both actions for breach of implied warranty and strict liability in tort." 9 D&C3d at 744. Indeed, the *Grimm* case, although a lower court case, raises a question as to whether petitioner is actually required to prove a sale in order to have a cause of action for breach of implied warranty of fitness. Petitioners herein, however, have conceded that a sale must be proved in the instant case. Thus, in determining whether the burden of proving a sale in a warranty case may be shifted from a non-purchasing injured plaintiff to the manufacturer who placed the item into the stream of commerce, it

is useful to examine strict liability cases in which the burden of proving causation was placed upon defendants because they were in a better position to provide proof thereof. Petitioners' research has revealed no Pennsylvania cases addressing this specific issue. Therefore, resort must be made to the law of other jurisdictions.

In Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948), the plaintiff was injured when two negligent hunters shot in his direction, one hitting him. The obstacle to plaintiff's recovering for his injuries was his inability to identify which of the two hunters fired the shot that hit him. The Court reasoned that "... it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. Thus the burden of proof shifted to the defendants, "each to absolve himself if he can." (33 Cal.2d 86, 199 P.2d 4).

In reaching its conclusion, the Court in *Summers* relied upon another California case, *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), in which the plaintiff was attempting to recover from several doctors and a nurse for injuries sustained while unconscious during the course of surgery. Because he was unconscious, plaintiff was unable to identify who had performed the alleged negligent act. In these circumstances, the Court held that it would be unreasonable to require such an identification. Rather, an inference of negligence arose that the defendants were required to rebutt by explaining their conduct.

Although the instant case is a warranty action, rather than one in tort, and petitioner is able to identify the defendant, it is clear that recent cases construing the circumstances in which the burden of proof will be shifted require the same result herein. That is to say, the require-

ment of proving a sale in the instant case is analogous to the requirement of proving causation in the tort cases in that each factor provides the basis for a valid claim against a particular defendant. Therefore, just as the burden shifted to the tortious defendants to disprove causation in the tort cases, so should the burden shift to the known manufacturer of a defective product to prove or disprove a sale in the instant case.

In *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); *cert. denied*, 3270 U.S.L.W. (10/14/80), the Supreme Court of California engaged in an exhaustive analysis of the *Summers* line of cases before concluding that *Summers* rule should be modified in favor of a plaintiff who through no fault of her own, could not identify which company manufactured a drug which caused severe injuries.

In *Sindell*, plaintiff was the daughter of a woman who had a drug administered to her during pregnancy. It was subsequently discovered that the drug, diethylstilbestrol (DES), may cause cancer in the daughters of women who took it, which cancer has a latent period of at least 10 to 12 years. Plaintiff ultimately developed a malignant bladder tumor which required surgery for its removal. She also suffered from adenosis.

Plaintiff brought an action against 11 drug companies and Does 1 through 100 on behalf of herself and other women similarly situated. She alleged causes of action based upon "Alternative liability" (*Summers*) "Concert of action" and "Enterprise liability". The Court rejected all three theories only to take it upon itself to propose and adopt a fourth theory which resulted in a shifting of the burden of proving causation to the defendants. In support of its actions, the Court stated,

> "The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof." 163 Cal. Rptr. at 144.

There is no reason why the same analysis should not apply in the instant case. Clearly petitioner is not at fault in failing to provide evidence of the sale of the hoist. Moreover, just as the marketing of a drug, the effects of which are delayed for many years, played a significant role in creating the unavailability of proof in *Sindell*, so has the inadequate record keeping of respondents herein.

The same reasoning was employed in *Haft v. Lone Palm Hotel*, 3 Cal.3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), where it was held that where the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, the burden of proof on the issue of causation was upon defendants. Similarly, since the absence of evidence of a sale in this breach of warranty case is a direct and forseeable result of respondents inadequate record keeping, the burden of proof should be upon respondents.

The final point to note about *Sindell* is that the Court rejected the defendants argument that *Summers-Ybarra* requires that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff before the burden of proof will be shifted, con-

cluding instead that *Summers* does not impose such a requirement. Thus, the case at bar is even stronger than *Sindell* with respect to the shifting of the burden in that respondents herein have greater access to the information regarding a sale of the hoist.

Basic policy considerations also compel a result which allows petitioner a recovery for his injuries. It has already been established that the law regarding the shifting of the burden of proof in tort cases is moving in a direction which provides more equitable results based upon a consideration of which party is more responsible in the first instance for the unavailability of evidence. The trend should be no different in cases brought for breach of warranty. Indeed, the Court of Appeals in the present case noted that, ". . . the concept of implying a warranty to extend liability to the manufacturer of a defective product has been, from the outset, only a rather transparent device to accomplish the desired result of strict liability" (17a). Furthermore, just as the manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects, *Sindell, supra,* it is also in a better position than a non-purchasing injured party to provide information with respect to distribution of its products. Thus, holding it liable for failure to maintain adequate business records will provide an incentive to proper record keeping.

As previously noted, the Court of Appeals refused to shift the burden of providing evidence relative to a sale in the instant case ". . . absent evidence of a close relationship between Eaton and Fluor. . . ." (9a). Petitioners respectfully submit that the relationship between Eaton and Fluor is of no significance. Both were named as defendants. Demand was made of both for production of evidence relative to a sale. The fact that Fluor did not document its posses-

sory interest in the hoist does not absolve Eaton of its responsibility of providing information which it should have available. Eaton bears this responsibility solely because it is the manufacturer and distributor of the hoist, not because it has any relationship with Fluor. The crucial factor is that both respondents were in a better position than petitioners to provide information relative to a sale. Moreover, petitioners are aware of no authority which requires a close relationship between co-defendants before the burden will be shifted from a plaintiff with no access to the necessary evidence to a defendant who is in a better position to provide such evidence. Therefore, the burden of proof relative to the consummation of a sale of the defective hoist from Eaton or one of its distributors to Fluor should properly be shifted to respondents who presumably have peculiar means of knowledge enabling them to prove the lack of a sale if there was none.

IV. The conclusion reached by the Court of Appeals relative to the Statute of Limitations is inconsistent with its conclusion relative to proof of a sale.

The Court of Appeals in part III B. of its opinion stated that Pennsylvania's Supreme Court has been moving towards viewing non-purchaser actions filed under the UCC as strict liability actions in tort, rather than as contract actions. The Court then concluded that as a result of this movement the statute of limitations should be two years, *i.e.*, that of strict liability cases. However, in part I of the opinion the Court concluded that petitioner failed to prove a sale and therefore, has no cause of action under the Uniform Commercial Code. Thus, petitioner is not only required to show that there was a sale, he must do so within a limitations period applicable to cases where

there is no such requirement. That is to say, the Court of Appeals has relied on the contractual nature of a UCC warranty action in part I of its opinion and simultaneously in part III B, it has stated that such actions are to be viewed as strict liability actions in tort, rather than as contract actions.

Petitioner contends that if, as the Court of Appeals believes, these actions are to be viewed not as contract actions but as tort actions, such a view must encompass not only the limitations period but other aspects of the cause of action as well. As it stands, the Court of Appeals decision does not achieve this result.

CONCLUSION

Based upon the foregoing it is clear that should this Court affirm the decision of the Court of Appeals, serious consequences will flow from the erosion of well established evidentiary principles requiring the allocation of the burden of proof. Moreover, a sanctioning of the retroactive application of a court decision changing the statute of limitations will result in a windfall to respondents, serious inequities to petitioners and a direct conflict with the applicable cases of this court.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ E. Harris Baum,
E. HARRIS BAUM
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2156

TERRANCE P. HAHN and BARBARA HAHN

v.

ATLANTIC RICHFIELD CO., a Pennsylvania corporation and JOHN DOE #1, EATON CORPORATION, Manufacturer and/or Supplier of the crane, and/or safety hook, and/or rigging and JOHN DOE #2, Crane Rental company and FLUOR ENGINEERS & CONSTRUCTORS, Third and Price Streets, Marcus Hook, Pennsylvania Eaton Corporation, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-2932)

Argued April 22, 1980

Before: ALDISERT, WEIS and GARTH, *Circuit Judges.*

(Filed July 3, 1980)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The appeal in this diversity case tried under Pennsylvania law requires us to decide whether the district court erred by refusing to enter judgment notwithstanding the verdict in favor of a manufacturer of a defective chain hoist that the jury found to have caused appellee's injuries. On December 14, 1972, appellee Terrance P. Hahn, an employee of Fluor Engineers and Contractors, was severely injured while working as a pipefitter at the Atlantic Richfield Company refinery in Philadelphia, Pennsylvania, when a 600-pound pipe suspended overhead by a Yale One Ton chain hoist fell on him. A jury found Eaton Corporation, the manufacturer of Yale hoists, liable for breach of warranty under the Pennsylvania Uniform Commercial Code for selling the defective hoist to Fluor, and awarded $1,050,000 to Hahn and his wife as damages for the breach. Because we conclude that the evidence at trial was insufficient as a matter of law to [illegible]ve a sale of the hoist, a predicate of any warranty action under Article 2 of the Code, we reverse the judgment of the district court.

I.

Approximately two years after the accident, on November 30, 1974, Hahn and his wife filed a complaint in the Eastern District of Pennsylvania alleging negligence against several defendants: Atlantic Richfield, on whose property the accident occurred, Fluor Engineers, Hahn's employer and, as a John Doe defendant, the manufacturer of the chain hoist. Because the hoist could not be located after the accident, Hahn asserted that he was unable to identify the manufacturer.[1] On June 30, 1976, the complaint was amended to substitute Eaton Corporation, the manufacturer of Yale hoists, as defendant. Eaton's answer to the complaint raised the defense that the action was barred by the Pennsylvania statute of limitations for personal injuries because Eaton had not been named as a defendant until more than two years had expired since the date of the injury.[2] Thereafter, on March 17, 1977, Hahn again amended his complaint to proceed against Eaton under Article 2 of the Uniform Commercial Code on the theory of breach of warranty of merchantability and fitness for a particular purpose. The amended complaint alleged that at the time Eaton sold the hoist to Fluor it contained a latent defect. No date of sale was averred, however. The district court ruled that the March 17 amendment related back to the June 30, 1976 amendment and concluded that

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1. Also named as defendant in the original complaint was John Doe No. 2, an alleged rental company of the hoist. On May 25, 1978, John Doe No. 2 was dropped as a defendant. On the same date, a directed verdict was entered in favor of defendant Atlantic Richfield. No appeal has been taken from that order.

2. Under Pennsylvania law, suits brought to recover damages for non-fatal personal injuries must be brought within two years from the date of injury. *See* 12 P.S. §34 (repealed 1978) (current version at 42 Pa. C.S. §5524 (2), effective June 27, 1978).

the Code's four year limitations period of Article 2 would not bar Hahn's claim unless Eaton could show that it sold the hoist to Fluor more than four years before June 30, 1976, the date Eaton was joined as a party.[3]

At trial, Hahn introduced opinion testimony of several eye witnesses to show how the accident had happened. In addition, testimony of two other pipefitters who were working with Hahn on the day of the accident was introduced to show that the hoist in question was a Yale One Ton hoist and that it was "new." *See* Appendix at 413a, 427a-28a. The hoist itself, however, was never introduced into evidence because it could not be located after the accident.[4] Hahn introduced no direct proof of sale. Instead, counsel read to the jury answers to certain interrogatories and requests for admissions by Eaton and Fluor showing that Eaton had manufactured a Yale One Ton chain hoist in 1971 or 1972 and that Fluor had supplied to the worksite the hoist involved in the accident.[5] Counsel

3. *See* U.C.C. §2-725, 12A P.S. §2-725, set forth in note 8 *infra*. *See also* 42 Pa. C.S. §5525 (2).

4. Notwithstanding exhaustive efforts by counsel for Hahn, as well as by counsel for Eaton, Fluor, and Atlantic Richfield, to ascertain the whereabouts of the hoist, it was never recovered. *See* Brief for Appellees at 1.

5. The following is the verbatim text of what counsel read to the jury.

> Q Did your company [Eaton] in 1971 or 1972 manufacture a One Ton Yale Chain Hoist?
>
> A Yes, but we have no knowledge that a Yale One Ton Chain Hoist was involved in the accident which is the subject of this lawsuit.
>
> Q If your company is not the distributor of such machine, state the name and the address of the distributor in 1971 and in 1972.

for Eaton offered into evidence Exhibit DE-1, which was an agreement dated December 15, 1971 between Atlantic Richfield and Fluor that governed the work Fluor was performing at the refinery. Among the listed equipment that Fluor was responsible for supplying pursuant to the agreement was a single one ton hoist.

At the close of trial, Eaton moved for directed verdict on the ground that Hahn had not established proof of sale of the hoist from Eaton to Fluor. The motion was denied. The jury returned a verdict in favor of Hahn and against Eaton on the issue of liability. Thereafter, in an unpublished opinion of June 20, 1979, the district court denied Eaton's post trial motion for judgment notwithstanding the verdict. This appeal by Eaton followed.

II.

Eaton raises two arguments that merit our consideration. First, it argues that because this case was tried under the

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A Eaton Corporation. There were different independent distributors of Yale Hoist[s] during 1971 and 1972. Our marketing department does not have records showing exactly who they were during these years.

The following admissions, if it please Your Honor, and the jury, are by Fluor Engineers and Constructors.

Q That the chain hoist involved in the accident which occurred on December 14, 1972, was owned and in the exclusive control and possession of defendant Fluor Constructors and Engineers by its agents, servants or workmen within the course and scope of their employment.

The answer to that question by Fluor is as follows:

The defendant Fluor Engineers and Constructors did supply the chain hoist involved in the accident which occurred on December 14, 1972. The details of ownership and control are not known and are therefore denied.

App. at 438a-339a.

warranty provisions of Article 2 of the UCC, the sales article of the Code, the district court erred by submitting to the jury the issue of whether the chain hoist was defective at the time of sale in the absence of any evidence that Eaton actually sold the hoist to Fluor.[6] Appellee Hahn, while conceding that to recover for breach of warranty under the Code he must first show that a sale of the hoist from Eaton to Fluor was consummated, *see* Brief for Appellees at 20-21; *see also* U.C.C. §§2-102,-106; *DeMatteo v. White*, 233 Pa. Super. 339, 336 A.2d 355 (1975), nonetheless contends that the record contains ample evidence from which the jury could properly have inferred that such a sale did in fact take place.

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6. The following special interrogatories were answered by the jury.

1. Did a malfunction of the hoist cause the accident?
Answer: Yes.

2. Was the hoist manufactured by Eaton?
Answer: Yes.

3. When was the hoist sold by Eaton?
(a) Before June 30, 1972 ____
(b) After June 30, 1972 ____
(c) Unable to determine when it was sold. X

4. At the time the hoist was sold by Eaton was there a breach of warranty; the express warranty that it was capable of lifting up to one ton of weight; the implied warranty of merchantability?
Answer: Yes.

5. Was the accident caused by the condition or characteristic of the hoist which constituted the breach of warranty?

Answer: Yes.

6. Was negligence on the part of the Fluor Company, plaintiff's employer, a cause of the malfunction of the hoist?

Answer: No.

App. at 576a-77a, 591a. Counsel for Eaton objected to interrogatory No. 3 on the ground that it presumed a sale of the hoist by Eaton to Fluor. *See* App. at 516a.

The standards that govern our review of this evidentiary issue are familiar. A jury verdict carries with it the benefit of all reasonable inferences capable of being drawn therefrom, and an appellate court is bound to interpret the evidence in the light most favorable to the verdict winner. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Kademenos v. Equitable Life Assurance Society*, 513 F.2d 1073, 1074 (3d Cir. 1975); *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 474 (3d Cir. 1973). Any fact that the jury could have reasonably inferred from the evidence in favor of the verdict winner will be presumed to have been so inferred when the court reviews the record supporting the verdict. If, however, the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess about its occurrence, then a judgment notwithstanding the verdict is required. *Denneny v. Siegel*, 407 F.2d 433, 442 (3d Cir. 1969); *see Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 n.5 (3d Cir. 1970).

Applying these precepts to the case at hand, we are left with the conclusion that Eaton is entitled to judgment notwithstanding the verdict. Proof of sale from Eaton to Fluor was an essential fact necessary to support the jury's verdict. The record evidence, however, even when interpreted most liberally in favor of Hahn, does not support the inference that a sale of the hoist from Eaton to Fluor was consummated. The jury could only have speculated about the occurrence of a sale. The evidence shows that Eaton manufactured and sold Yale One Ton hoists in 1971 or 1972; that the contract between Fluor and Atlantic Richfield called for a one ton hoist to be used by Fluor in performing work at the refinery; that Fluor supplied the

hoist involved in the accident; and that the defective hoist was a Yale hoist and was "new" on the date of the accident. None of this evidence, however, tends to show, even remotely, how Fluor came to possess the hoist. It is possible that the hoist may have been obtained by lease, or by bailment; the rental of specialized equipment or machinery to contractors is commonplace.[7] The hoist may have been purchased as part of a bulk transfer. It may have been found by, or even given to Fluor. Or, as the jury inferred, it may have been purchased by Fluor from Eaton. Although all of these are conceivable possibilities, none of them can be properly inferred from the evidence presented at trial. There is simply no evidence, either direct or circumstantial, that would indicate how Fluor came to possess the hoist. We are left with no other determination but that the jury ventured a guess that the defective hoist was purchased by Fluor from Eaton. We conclude, therefore, that the record is legally insufficient to support a verdict in favor of Hahn because it lacks that "minimum quantum of evidence from which a jury might reasonably afford relief." *Denneny v. Siegel*, 407 F.2d at 439.

Appellees argue that they made all possible attempts to uncover information regarding a sale of the hoist. They contend that for this court to rule that they failed to sustain their burden of proof on this issue would be manifestly unjust because any information concerning a sale of the hoist should have been in the business records of either Eaton or Fluor. Appellees would have us conclude that liability for Mr. Hahn's injuries should not be avoided by

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7. *See, e.g.*, Greater Pittsburgh Business Industrial Yellow Pages, 621-24 (1979). We have previously noted appellees' alternative theory in their original complaint alleging that John Doe No. 2, Crane Rental Company, had leased the hoist and was responsible for Hahn's injuries. *See* note 1 *supra*.

Eaton simply because neither company's records satisfied their counsel's inquiries.

We will not accept this argument. That counsel could not uncover information of sale, presumably even though employing the liberal discovery procedures allowed by the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 26, 34, indicates that documentary evidence of a sale to Fluor probably did not exist. We recognize that under certain circumstances a court may demand production of evidence from a party not having the ultimate burden of persuasion, and then draw a negative inference from that party's non-production. *See generally* 9 J. Wigmore, Evidence §2486 (3rd ed. 1940). But absent evidence of a close relationship between Eaton and Fluor, we will not allow the verdict against Eaton to stand on an unfavorable inference drawn from Fluor's inability to document its possessory interest in the hoist. Nor will we draw such an inference from the unexplained disappearance of the defective hoist after the accident. While this amounted to an unfortunate development for appellees, we are not willing to penalize Eaton because of the loss, especially when Eaton had no knowledge of the accident until almost four years after its occurrence, and in light of the representation to this court by counsel for appellees that counsel for all parties to this litigation diligently, albeit unsuccessfully, attempted to locate the hoist. *See* note 4 *supra*.

We therefore conclude that the district court erred by not granting Eaton's motion for judgment notwithstanding the verdict.

III.

Even were we to decide that Hahn satisfied his burden of proof on the sale issue, we would be inclined to overturn

the judgment of the district court based on appellant's second argument, that the applicable statute of limitations barred this suit.

As previously stated, the accident occurred on December 14, 1972. The law suit, initially sounding in negligence, was instituted on November 12, 1974, but Eaton was not substituted as a defendant until June 30, 1976, more than three and one-half years after the accident. Because Pennsylvania law requires that personal injury claims be brought within two years of the date of injury, *see* note 2 *supra,* the complaint was amended on March 17, 1977, to allege breach of warranty under the UCC. The district court ruled that this latter amendment related back to June 30, 1976, for purposes of determining whether the suit was timely filed, and ruled further that because the complaint against Eaton now alleged breach of warranty under the UCC, the four-year provision of UCC §2-725 would apply.[8] The court concluded that the suit was not barred because Eaton failed to shoulder its burden of

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8. Section 2-725, 12A P.S. §2-725, provides:

§2-725. Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy

proving that the sale to Fluor occurred more than four years before Eaton was entered as a party. Although we agree with the district court that the running of the statutory time period is an affirmative defense to be raised and proved by the defendant, we disagree that the UCC four-year provision would control this action. We predict, and when a federal court applies state law in a diversity case it is just that, a prediction, *see Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1286 (3d Cir. 1979) (in banc) (Statement of Aldisert, J.), that the Supreme Court of Pennsylvania, if faced with the factual complex of this case, would hold the two-year statute for personal injuries applicable to this suit.

A.

An examination of several Supreme Court of Pennsylvania decisions is critical to our analysis. In *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964), plaintiffs instituted a breach of warranty action based on their contract for the purchase of gas from the Gas Works. The complaint alleged that the Gas Works warranted that the gas would be transmitted to the Gardiners in a safe manner, and that the Gardiners sustained personal injuries as a result of the Gas Work's failure to prevent gas from leaking into their home. The action was filed two years and eight days after the injury and the court of common pleas granted defendant's motion to dismiss the complaint on

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by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

the ground that the action was barred by the two-year statute of limitations. On appeal, the supreme court reversed, holding that the four-year limitation period of UCC §2-725 applied, and therefore that the action was not barred.

In reaching this result, the court reasoned that section 10-103 of the Code, 12A P.S. §10-103, which provides that "all acts and parts of acts are repealed in so far as they are inconsistent herewith," indicates that UCC §2-725 operates to repeal the limitations statute for personal injuries, 12 P.S. 34, insofar as the latter applied to contract actions for personal injuries arising from breach of warranty, 413 Pa. at 418, 197 A.2d at 613. The court also based its decision on the general policies underlying the Code, noting that §2-715 expressly permits consequential damages for personal injuries proximately resulting from any breach of warranty. *See* UCC §2-715(2)(b). In addition, the court relied on §1-102, which directs liberal construction of the Code in order to promote simplification and modernization of the rules governing commercial transactions, as well as to promote uniformity of the law among the various jurisdictions. The court concluded that one of the main purposes of the limitation statute under the Code was to introduce a uniform statute for all sales contracts regardless of whether the damages sought were for personal injuries or otherwise. 413 Pa. at 418-20, 197 A.2d at 613-14. Concerning the effect its holding would have on tort actions for personal injuries, the court stated:

> In this Commonwealth we have always recognized that a personal injury claim based upon a breach of warranty is a distinct claim from a personal injury claim based on negligence. . . . Under such circumstances, a holding that Section 2-725 controls in this instant situa-

tion will effect no change in the substantive law of the Commonwealth.

Id. at 419, 197 A.2d at 614.

In *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823(1965), the court was faced with deciding from what date the four-year period of §2-725 should be measured to determine if a purchaser's suit for breach of warranty under the Code was barred. Plaintiff filed his action on July 12, 1960, after being injured on December 8, 1957, when gas escaped from a defective valve on a portable liquid gas cylinder in March 1956, more than four years before the filing of his complaint. The trial court dismissed the action.

In affirming the dismissal of the complaint, the Supreme Court of Pennsylvania concluded that actions brought under the Code to recover consequential damages arising from a breach of an implied warranty must be commenced within four years of the time when tender of delivery of the defective product is made, and not within four years of when the injury occurred. 417 Pa. at 113, 207 A.2d at 826. The court based this determination on the explicit wording of §2-725, which states in part that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made." *See* note 8 *supra.*

Gardiner and *Rufo* were decided before the seminal decision of *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), in which Pennsylvania adopted 402A of the Restatement (Second) of Torts. Both cases involved actions for consequential damages for personal injuries brought by plaintiffs who were in privity of contract with the seller of the defective products. At the time when those cases were decided, privity of contract—both vertical and

horizontal—was required by Pennsylvania law as an element of a warranty action under the UCC. *See Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963). Privity was being retained under the Code even though the court was simultaneously expanding manufacturer liability under the concept of strict liability in tort. *See Webb v. Zern.*

This anomaly did not last long, however, for within two years of *Webb v. Zern*, the attack on the formalistic requirement of privity had begun. In *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968), the court abolished the need to allege vertical privity in implied warranty cases under the Code, thereby overruling *Miller v. Preitz*. Speaking through Justice Roberts, the court reasoned that the caption on the complaint in a products liability case should not produce a different result from an otherwise identical case simply because the action is brought in assumpsit instead of trespass. At least with respect to the privity issue, the court continued, the UCC must be coextensive with section 402A of the Restatement. 432 Pa. at 231, 246 A.2d at 854. Justice Roberts stated:

> We realize that prior to the adoption of section 402a of the Restatement of Torts by this Court, . . . a rather compelling argument against discarding privity in assumpsit actions for breach of warranty existed. Under the Uniform Commercial Code, once a breach of warranty has been shown, the defendant's liability, assuming of course the presence of proximate cause and damages, is absolute. Lack of negligence on the seller's part is no defense. Therefore, prior to the adoption of section 402a, it could be said that to dispense with privity would be to allow recovery in contract without proof of negligence, while requiring a showing of negligence in order to recover for the same wrong against

> the same defendant if suit were brought in tort. To permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and has never been, a sound resolution of identical controversies.
>
> However, with Pennsylvania's adoption of Restatement 402a, the same demands of legal symmetry which once supported privity now destroy it. Under the Restatement, if an action be commenced in tort by a purchaser of a defective product against a remote manufacturer, recovery may be had without a showing of negligence, and without a showing of privity, for any damage inflicted upon the person or property of the plaintiff as a result of this defective product.

432 Pa. at 228-29, 246 A.2d at 853-54.

This approach was extended in *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974) (*Salvador I*), a case factually similar to the case at hand, in which the supreme court abolished the requirement of horizontal privity in breach of warranty cases. Salvador, an employee of a company that purchased a boiler from the defendant, suffered severe bilateral hearing loss when the boiler exploded near his work station. Because Salvador was not considered to be in horizontal privity with the purchaser of the boiler, the trial court dismissed his complaint. The superior court reversed, 224 Pa. Super. 377, 307 A.2d 398 (1973), and the supreme court affirmed, overruling *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).[9] In so doing, the court relied heavily on its opinions in *Webb v. Zern* and *Kassab v. Central*

9. Salvador's complaint alleged two counts, one in trespass based on 402A strict liability, and the other in assumpsit based on warranty theory. Although defendant had raised the defense of the statute of limitations, the supreme court did not have that question before it on appeal. *See* 457 Pa. at 26, n.2, 319 A.2 at 904, n.2.

Soya, once more reiterating a concern that the same result be reached in a law suit alleging product defect irrespective of whether the action is brought in trespass or assumpsit. Speaking again through Justice Roberts, the court stated:

> Today, as the Superior Court correctly recognized, a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety. See *Webb v. Zern*, supra; *Kassab v. Central Soya*, supra. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect. He may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process. *Webb v. Zern*. Neither may the manufacturer defeat the claim by arguing that the purchaser has no contractual relation to him. *Kassab v. Central Soya*. Why then should the mere fact that the injured party is not himself the purchaser deny recovery?
>
> Because the manufacturer is now a guarantor, the "harsh and unjust result" is worked on the plaintiff who may recover for his injury or loss if his complaint is in trespass, but on identical facts would be denied relief if the pleading is captioned "Complaint in Assumpsit." See *Kassab*, supra at 229, 246 A.2d at 853. This anomalous situation is certainly to be avoided. Thus "[w]ith Pennsylvania's adoption of Restatement 402a, the same demands of legal symmetry which once supported privity now destroy it." Id.

457 Pa. at 32-33, 319 A.2d at 907-08 (footnote omitted).

By removing the last indicium of privity, the court in *Salvador I* made recovery for all non-purchaser claimants under the Code coextensive with recovery that would be afforded under 402A. With this in mind, we turn to deciding which limitations period is most compatible with this approach.

B.

Determining which Pennsylvania statute of limitations should apply to non-purchaser warranty actions for personal injury is not an easy task. The difficulty arises because each of the theories of liability that have developed --strict liability in tort and liability for breach of warranty under the UCC—may be considered to call for the application of a different statute. The problem is compounded by the fact that the doctrine of strict liability grew simultaneously from contract and tort theories, and as a consequence, contract and tort law have been somewhat confused in this area.

It is now generally accepted, however, that the concept of implying a warranty to extend liability to the manufacturer of a defective product has been, from the outset, only a rather transparent device to accomplish the desired result of strict liability. *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *see also* Restatement (Second) of Torts §402A, comment m (1965); Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 802 (1966). Although strict liability of a manufacturer to a person not in privity has been based on the theory of a warranty running with a product to the injured plaintiff, the abandonment of the requirement of a contract between the parties involves a recognition that liability is not assumed by any contract agreement

but is imposed by law. As Dean Prosser has stated, implied warranty is

> a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract."

Prosser, *Assault upon the Citadel*, 69 Yale L. J. 1099, 1126 (1960) (footnotes omitted).

There exists, however, a fundamental difference between tort and contract. That difference lies in the nature of the particular interest protected. Tort law is predicated on social policy that protects a plaintiff, as a member of a class of people to whom a duty is owed, in his interest to be free from unreasonable risks of injury. This interest is protected by imposing on the defendant as a matter of law a duty to perform to a certain standard of conduct. *See Bradshaw v. Rawlings*, 612 F.2d 135, 138-41 (3d Cir. 1979). If injury occurs, tort law attempts to place the injured party in the same position he occupied before the injury. By contrast, contract law protects the expectation interests of contracting parties based on a voluntary agreement that defines their relationship. Protection is limited to those individuals specifically named in the contract, and enforcement is based on the manifestation of intent between the parties. Only rarely will the power of the parties to effect their desires be inhibited. If breach occurs, contract law seeks to give to the non-breaching party the benefit of his bargain, to put him in the position he would have been in had there been no breach. *See generally*

W. Prosser, Law of Torts, §93, at 6344-43 (3d ed. 1964); Wade, *Section 402A and the UCC*, 42 Tenn. L. Rev. 123 (1974).

In evaluating these different interests, the Supreme Court of Pennsylvania has been moving in the direction of viewing non-purchaser actions filed under the UCC as strict liability actions in tort, rather than as contract actions. *See Kassab v. Central Soya*, 432 Pa. at 227-35, 246 A.2d at 852-55; *Salvador v. Atlantic Steel Co.*, 457 Pa. at 26-33; 319 A.2d at 906-08. It follows, then, that products liability cases in Pennsylvania would be controlled by the personal injury statute of limitations, rather than the contract provision of UCC §2-725, because the supreme court is extending liability in this area, based not on the contractual intent of the manufacturer, but purely as a matter of social policy. Liability is being imposed to protect the interest in freedom from injury to the person. We therefore predict that the statute of limitations specifically designed by the legislature to offer a defendant repose after two years from when he invaded that interest is the statute of limitation that the Pennsylvania court would apply to these actions.

Kassab and *Salvador I*, the most recent pronouncements of the supreme court in this area, are strong evidence that the *Gardiner* and *Rufo* decisions would not be extended to control Hahn's claim of breach of implied warranty. Both *Gardiner* and *Rufo* involved direct contract actions for consequential damages brought by purchasers of the defective goods. Even if *Gardiner* were correct that the Pennsylvania legislature intended to preempt the tort limitations statute as it related to buyers actions for product defect, this would not mean that the same intent applied to actions by non-purchasers for breach of implied war-

ranty.[10] Furthermore, the rationale underlying *Kassab*, that the resolution of identical controversies should not depend on the caption atop the complaint, does not support an approach requiring that §2-725 be applied to this action.

In his analysis of the *Gardiner-Rufo* rule, John E. Murray, Jr., Dean of the University of Pittsburgh School of Law, advances two independent reasons why §2-725 should not apply to personal injury actions brought by non-purchaser claimants.

Murray, *Products Liability—Another Word*, 35 U. Pitt. L. Rev. 255 (1973). His first reason is based on a literal interpretation of the terms of §2-725, in which he shows that the section does not extend to non-contracting parties.

> There is no mention of personal injury actions or, for that matter, third party beneficiary actions, in Section 2-725 or the comments thereto. The section is entitled, "Statute of Limitations in Contracts for Sale." The entire section is directed toward the typical buyer of goods in the typical commercial transaction. It requires an action to be commenced within four years after the cause of action has accrued. A cause of action accrues when the breach occurs, regardless of the aggrieved party's knowledge of the breach. The Code then proceeds to clarify the precise time when a breach of warranty occurs and that is when tender of delivery is made. Since "delivery" is made only to the buyer, it can only be relevant to the buyers to commence the statutory period. If there is a breach of warranty upon delivery in that the goods are non-conforming, only the buyer has a cause of action at that time. The only legal

10. That such a result was contemplated by the legislature is highly unlikely. *See* Murray, *Products Liability—Another Word*, 35 Pitt. L. Rev. 255, 264-66 (1973). *See also* Wade, *402 and the UCC*, 42 Tenn. L. Rev. 123, 130-41 (1974) (UCC does not preempt tort liability).

relationship existing at that time is between buyer and seller. If this interpretation needs buttressing, it is found in the section itself which indicates that the cause of action accrues when the breach occurs, "regardless of the aggrieved party's lack of knowledge of the breach." But, who is an "aggrieved party"? There is no doubt on this score since the Code defines "aggrieved party" as any party entitled to a remedy. At the time of delivery, which is when the limitations period commences, the only possible aggrieved party is the buyer and, therefore, the buyer is the only party entitled to a remedy at that time.

Under this analysis the conclusion is inescapable that the section is designed to apply a four-year period to the typical commercial buyer commencing at the time the buyer takes delivery. A comment to the section reinforces this exclusive focus, stating that, "[t]his article takes *sales contracts* out of the general laws limiting the time for commencing *contractual actions* and selects a four-year period as the most appropriate to modern business practice." The enormous problems caused by the characterization of a personal injury action for breach of warranty as "contractual" have long been exposed. Yet, Pennsylvania [referring to *Gardiner* and *Rufo*] and many other jurisdictions continue to apply a "contractual" statute of limitations to cases which have nothing to do with contract. They reach that result in a formalistic fashion.

Id. at 267 (footnotes omitted).

Dean Murray also suggests that an application of §2-725 to non-purchaser actions would circumvent the objective of *Kassab* as well as the purpose of the personal injury

statute of limitations that governs strict liability actions in Pennsylvania. Because Code warranty actions are required to be commenced within four years from the date of delivery to the buyer, it is conceivable that many injured non-purchasers could be barred from ever bringing their actions prior to the time their injury was caused by the defective product. Likewise, if a non-purchaser claimant is permitted to recover under the four-year Code provision, it will be by sheer accident because he has no relationship to the date of delivery of the defective product to the buyer. *Id.* at 270.[11] In this context, §2-725 would act as a definition of the life of the warranty, possibly cutting off a non-purchaser's cause of action before it even accrues, instead of functioning as a statute of limitations, whose purpose it is to protect defendants from the prosecution of stale claims.

In light of the possible discrepancies that the application of §2-725 could cause in this context, and based on the *Kassab* rationale of the desirability of consistency of results in products liability cases, we conclude that the Supreme Court of Pennsylvania would apply the personal injury statute of limitations to govern Hahn's claim of breach of implied warranty in the alleged sale of the defective hoist to his employer. We note that our holding on this issue comports with the result reached by the Superior Court of Pennsylvania in *Salvador v. Atlantic Steel*

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11. As an example of this Dean Murray suggests the following.

> [I]f a non-buyer-plaintiff is personally injured and does not commence his action until twenty-five months after the injury, he may not use 402A; and, if the product was delivered to the buyer more than four years before he commences his action, neither may he use the Code. On the other hand, non-buyer B, under otherwise identical circumstances, *may* use the Code if the product happened to be delivered to the buyer less than four years from the time the action is commenced, though the

Boiler Co., 256 Pa. Sup. 330, 389 A.2d 1148 (1978) *(Salvador II), allocatur granted*, No. 455 (October 31, 1978), per Judge, now President Judge, Cercone.[12]

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action is commenced twenty-five months after the injury was sustained. This irreconcilable possibility should be eliminated.

35 Pitt. L. Rev. at 270. *See, e.g., Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975), *overruling Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969).

12. After the case proceeded to trial following remand by the supreme court in *Salvador I*, the facts showed that Salvador's employer had purchased the boiler as part of a bulk transfer from the I. H. English Company in 1964. In turn, I. H. English had had the boiler installed in 1962 by the defendant manufacturer. Mr. Salvador was injured in May 1967 and filed suit in 1971. The trial court granted defendants' motion to dismiss the suit as untimely, both as to the 402A claim because it was not brought within two years of the date of injury, and as to the UCC warranty claim because the suit was instituted four years after the date of tender of delivery, whether delivery was considered to be the bulk transfer or the installation of the boiler. The superior court in *Salvador II* affirmed the dismissal, ruling that the two-year limitations statute should be uniformly applied to all third party personal injury claims arising from defective products, whether brought in trespass or assumpsit.

Salvador II was handed down on July 12, 1978, two months after the conclusion of the trial in the case at bar. The district court believed that as a decision of an intermediate appellate court, *Salvador II* announced a new rule of law in Pennsylvania that should not be applied retroactively because it marked a sharp departure from earlier Pennsylvania supreme court cases, namely *Gardiner* and *Rufo*, on which counsel was entitled to rely.

We disagree. As we have indicated, we believe that the law in Pennsylvania has been moving away from the *Gardiner-Rufo* approach for quite some time, as evidenced by the supreme court decisions in *Webb v. Zern*, *Kassab*, and *Salvador I*. In this light, the superior court's opinion in *Salvador II* is not a departure from, but rather further evidence of, this development.

IV.

The judgment of the district court will be reversed and the proceedings remanded with a direction to enter judgment in favor of the appellant.[13]

13. Judge Garth does not believe that the statute of limitations issue should be reached or decided once we have concluded that the district court erred in not granting Eaton's motion for judgment notwithstanding the verdict based on failure of proof of sale. Accordingly, even though he agrees with the majority's analysis and conclusion, he is of the view that because Section III constitutes dictum only, there should have been no attempt to predict the result which the Pennsylvania Supreme Court will reach when it has the statute of limitations question before it in *Salvador II*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRANCE P. HAHN and BARBARA HAHN : CIVIL ACTION

v.

ATLANTIC RICHFIELD CO., *et al.* : No. 74-2932

MEMORANDUM AND ORDER

FULLAM, J. JUNE 20, 1979

Plaintiff, Terrance P. Hahn, was employed by Fluor Engineers and Constructors, and was working as a pipefitter at the ARCO refinery in Philadelphia when, on December 14, 1972, he was struck on the head by a falling pipe and suffered severe personal injuries. A jury has awarded him $900,000 in damages, and has awarded his wife $150,000 for loss of consortium, solely against the defendant Eaton Corporation, the manufacturer of the hoist from which the pipe fell. The defendant now seeks judgment n.o.v., or a new trial.

I. MOTION FOR JUDGMENT N.O.V.

Plaintiffs proceeded against the defendant Eaton solely on the theory of breach of warranty. They alleged that Eaton manufactured the hoist and sold it to plaintiff's employer, Fluor; that at the time of the sale, there was a breach of warranty of merchantability and fitness for purpose, in that, owing to a latent defect in the hoist, it was not actually capable of safely lifting the one-ton load for

which it was warranted; and that plaintiff's injuries stemmed from the defect in the hoist which constituted the breach of warranty. In answers to specific interrogatories, the jury accepted all of plaintiffs' assertions. The principal problem now before the Court arises from the following circumstances:

The accident occurred, as stated above, on December 14, 1972. Suit was instituted on November 30, 1974, but the only defendants named at that time were ARCO and "John Doe No. 1" and "John Doe No. 2." It was not until June 30, 1976, that plaintiffs amended their Complaint by substituting Eaton as the entity intended to be designed by the appellation "John Doe No. 1." It was not until the start of the trial, in May of 1978, that "John Doe No. 2" was dropped as a defendant.

The first challenge to this procedure need not detain us long. While it is true that, technically, the inclusion of "John Does," whose citizenship is necessarily unknown, destroys diversity and, if unremedied, would preclude subject-matter jurisdiction in a federal court, I believe this is the kind of defect which can be, and properly was, remedied. Before the conclusion of the trial, there was complete diversity of citizenship between plaintiffs and all of the defendants.

The more serious difficulty has to do with the application of the statute of limitations. Throughout the trial and pretrial period, the defendant took the position that, since plaintiffs originally based their claim entirely upon a negligence theory; and since the proper statute of limitations period applicable to negligence actions was two years from the date of injury; and since Eaton was not named as a defendant until after that date, plaintiffs' later decision to amend their Complaint against Eaton to allege breach of warranty should not relate back. I took the position, which

I continue to believe was correct, that the amendment of plaintiffs' Complaint to charge breach of warranty relates back to June 30, 1976, the date when Eaton first was named as a party to this lawsuit. As a result of post-trial changes in Pennsylvania law, however, that issue may be academic.

The trial of the case was conducted on the theory that plaintiffs' claims against Eaton would be barred unless brought within four years of the date of the sale of the hoist by Eaton. Thus, if the sale by Eaton occurred earlier than June 30, 1972, plaintiffs' claims were time-barred. The evidence as to when the sale occurred was conflicting and in some confusion. The jury was invited to express one of three alternative findings: that the sale occurred before June 30, 1972; that the sale occurred after June 30, 1972; or that the jury was unable to make a finding as to precisely when the sale occurred. The jury found itself unable to decide whether the sale had occurred before or after June 30, 1972. Since defendant bore the burden of proving that plaintiffs' claims were time-barred, the plaintiffs prevailed.

On July 12, 1978, some two months after the conclusion of the trial, the Superior Court of Pennsylvania announced its decision in the case of *Salvador v. Atlantic Steel Boiler Co., et al.* Pa. Super., 389 A.2d 1148 ("*Salvador II*"), in which it held that the four-year limitation period provided in the Uniform Commercial Code has no applicability to third-party suits for personal injuries (*i.e.*, claims that a breach of warranty occasioned personal injuries to someone other than the direct purchaser). If that holding is to be applied in the present case, plaintiffs' suit against Eaton should have been filed not later than December 14, 1974.

Since this action was filed on November 30, 1974, the first question is whether the amendment substituting Eaton for "John Doe No. 1" relates back to the filing of suit.

Under F.R.Civ.P. 15(c), the amendment here would relate back only if

> "[Eaton] (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

It does not appear that these two conditions have been met in the present case. It thus appears that the suit was not effectively instituted against Eaton until June 30, 1976.

The ultimate question, therefore, is whether the holding in *Salvador II* is to be applied retrospectively.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court listed three factors to be taken into account in determining whether its decisions are to have retroactive application: (1) whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .;" (2) the prior history of the rule in question, and whether retrospective operation will further or retard the operation of the rule; and (3) whether retroactive application would produce "substantial inequitable results." 404 U.S. 97 at p. 106. I believe a Pennsylvania court would apply these same criteria, and thus would not apply the *Salvador II* rule in the circumstances of the present case.

It is clear from a reading of the *Salvador II* opinion that that Court considered itself to be announcing a new rule of law, intended to produce "symmetry" in Pennsylvania's jurisprudence, after the abolition of the horizontal-privity requirement opened the door to third-party claims for

breach of warranty. It is also clear that the decision marks a sharp departure from the approach taken in earlier precedent, upon which plaintiffs' counsel had a right to rely. *See Rufo v. The Bastian-Blessing Co.*, 417 Pa. 107 (1965); *Gardiner v. Phila. Gas Works*, 413 Pa. 415 (1964); *Peeke v. Penn Central Trans. Co.*, 403 F. Supp. 70 (E.D. Pa. 1975), *aff'd* 538 F.2d 320 (3d Cir. 1976); *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972); *Salvador v. Atlantic Steel Boiler Co.*, 224 Pa. Super. 377, 307 A.2d 398 (1973) ("*Salvador I*"). This case was prepared for trial and submitted to the jury on the basis of Pennsylvania law as it then stood. It would be decidedly unjust, and would impose undue hardship, to apply retroactively the post-trial decision in *Salvador II*, in these circumstances; it is reasonable to suppose that plaintiffs' counsel would have exerted greater and earlier efforts to ascertain the true identity of the manufacturer of the hoist, had there been any reason to suppose the limitations period provided by the Uniform Commercial Code would not be applicable.

A further reason for not now rejecting plaintiffs' claims as time-barred is that the decision of the Superior Court in *Salvador II* has not yet become final. The Supreme Court of Pennsylvania granted *allocatur* in August of 1978, and the appeal is still pending. As noted by the Third Circuit Court of Appeals in *Leone v. Aetna Casualty & Surety Co.*,

F. 2d (3d Cir., No. 78-1905, June 8, 1979) (slip op. at pp. 7-8), a federal court in a diversity case is not bound to adopt recent decisions by lower or intermediate state courts. Although the decision of the Superior Court is entitled to great deference, the ultimate question is how the State Supreme Court would decide the issue. At the very least, it can be said that that ultimate question is not so clearly answered at the present time as to justify upsetting plaintiffs' hard-fought victory at trial.

The jury's verdict finds adequate support in the evidence. The Motion for Judgment N.O.V. will be denied.

II. MOTION FOR NEW TRIAL

Defendant complains that the testimony of plaintiffs' expert witness was improperly admitted. This objection overlooks Rules 703 and 705 of the Federal Rules of Evidence. All of the trial rulings concerning expert testimony was properly received.

It is also asserted that the evidence was insufficient to support various aspects of the jury's answers to special interrogatories. As stated above, I believe the evidence was adequate to support the jury's findings.

Finally, the Court is charged with error in refusing to instruct the jury that plaintiffs bore the burden of proving that no substantial change had occurred in the hoist between the date of sale and the date of the accident. The basis for this argument is simply non-existent. The Court's charge, read as a whole, plainly conveyed the gist of the requested instruction. It included the following:

> "In order to make out a case of breach of warranty, the plaintiff must show by the fair weight of the evidence that the defendant was the manufacturer of the hoist which was being used at the time of the accident. He must establish by the fair weight of the evidence that the defendant sold that hoist, and he must establish by the fair weight of the evidence that at the time of the sale the warranties which either were expressly made by the defendant or which the law implied were not lived up to.
>
> "As far as the law is concerned, a breach of warranty occurs, if it occurs at all, at the time of the sale. In

short, we are focusing attention on the circumstances as they existed at the time of the sale (Tr. p. 202).

"[If you conclude that the defendant sold the hoist] then you ask yourselves: What was the condition of the hoist at the time of the sale? (Tr. p. 202).

"You would ask yourselves: If that is what the condition was, if the metal of that tooth was defective at the time of the accident, was that a condition which was in existence at the time of the sale of the hoist?

"If you conclude that it is more probable than not that Eaton did manufacture the hoist and that Eaton did sell the hoist and that at the time it was sold it had a defect in it which rendered it unmerchantable —that is to say, not of merchantable quality and not fit for the purpose for which it was intended—then you would have a right to return a verdict in favor of the plaintiff if it was that defect which caused the accident (Tr. pp. 203-204).

"If you conclude that the hoist did malfunction, was that malfunction of a nature or cause[d by] a condition or characteristic of [the] hoist which constituted a breach of warranty which existed at the time the hoist was sold? If you conclude that it was, then you would have a right to return a verdict in favor of the plaintiff . . . (Tr. p. 204).

". . . and let me be very explicit about that. In order for a plaintiff to recover you must be satisfied that it is more probable than not that Eaton did manufacture the hoist, that Eaton did sell the hoist, that there was a defect in the hoist which caused it to malfunction, that the defect or condition existed at the time it was sold, that that defect or condition constituted a breach of warranty rendering the hoist not of merchantable

quality and not fit for the purpose for which it was intended and that defect was a proximate cause of the malfunction and of the accident" (Tr. pp. 204-205).

The Motion for a New Trial will also be denied.

ORDER

AND NOW, this 20th day of June, 1979, it is ORDERED that:

1. The Motion of the defendant Eaton Corporation for Judgment N.O.V. is DENIED.

2. The Motion of the defendant Eaton Corporation for a New Trial is DENIED.

3. Judgment is entered on the verdict of the jury in favor of the plaintiffs and against the defendant: in favor of plaintiff Terrance P. Hahn in the sum of $900,000, and in favor of the plaintiff Barbara Hahn in the sum of $150,000, for a total of $1,050,000.

By: /s/

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 79-2156

TERRANCE P. HAHN and BARBARA HAHN

vs.

ATLANTIC RICHFIELD CO., a Pennsylvania corporation and JOHN DOE #1, EATON CORPORATION Manufacturer and/or Supplier of the crane, and/or safety hook, and/or rigging and JOHN DOE #2, Crane Rental Company and FLUOR ENGINEERS & CONSTRUCTORS, Third and Price Streets, Marcus Hook, Pennsylvania
Eaton Corporation,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS GIBBONS, ROSENN, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellees, Terrance P. Hahn, et al.

In the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

By: /s/
Circuit Judge

Dated: September 25, 1980.

Received and Filed
September 25, 1980

/s/Sally Mrvos
Clerk

APPENDIX D

UNITED STATES STATUTES INVOLVED

28 §1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be

deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, §2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, §1, 78 Stat. 445.

28 §1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.